VIRGINIA LAW REGISTER

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The Albemarle Bar, XI.

In the decade extending from 1835 to 1845, names which are yet familiar to the present generation are found upon the rolls of the Albemarle County Bar. George W. Randolph, who was a brother of Thomas Jefferson Randolph and a grandson of Mr. Jefferson, and who was afterwards Secretary of War of the Confederate States, is one of the prominent names on the list. Franklin Minor and W. W. Minor, who qualified in 1835 never pursued the practice of law beyond the mere fact of qualification, W. W. Minor becoming a very prominent Albemarle farmer. Benjamin J. Darneille settled at the Town of Scottsville in Albemarle Connty and qualified to practice in 1835, being quite a prominent lawyer on the south side of the County and having an execellent practice. He served as a major in the Reserve Forces commanded by Col. R. T. W. Duke during the last two years of the war and was a very efficient and able officer. The late Senator Thomas S. Martin read law in Mr. Darneille's office and always spoke of him as being one of the most careful and painstaking lawyers he knew.

Angus R. Blakey, who qualified in 1835, practiced for a number of years at the Madison County bar, being a resident of that County. He removed to this County about 1870 and had a large practice both in the County of Albemarle and in the adjoining counies of Greene and Madison. He was a member from the latter County, of the Virginia Convention which passed the ordinance of secession. He lived to an extreme old age and was noted for his ability as a jury lawyer. He was a prominent member of the Charlottesville Presbyterian Church and served as an elder for a long time.

Allen B. Magruder who qualified at the same time as Mr. Blakey, was more important as a minister in the Disciples Church

than as a lawyer, though at one time he had a very excellent practice at the Albemarle Bar but was rather eccentric.

Three names appear in the list, however, worthy of an extended mention: Shelton F. Leake, William J. Robertson and John Randolph Tucker. Shelton F. Leake was born in Albemarle County near Hillsboro on November 30th, 1812. He received an excellent education, though he never attended college or the University. He taught school and whilst teaching studied law. He was admitted to the bar in 1835 and commenced practice at Charlottesville, where he spent the balance of his life. He was a member of the State legislature in 1842; Presidential Elector on the Democratic ticket in 1848, and was elected Lieutenant Governor in 1851, and a representative in the United States Congress in the 29th and 36th Congress, being a very ardent Democrat.

Mr. Leake probably had no equal in his time as an advocate and criminal lawyer. He was a man of infinite wit, of wonderful eloquence, and no man ever had greater power with juries and the people of the county. He had the invaluable faculty of commanding at once attention both on the hustings and in the court room and no one ever saw either an audience, court or jury show the slightest signs of weariness during an argument of his. He had a very large and successful criminal practice and was probably as widely known and as much beloved in the County of Albemarle as any man of his generation. His power of sarcasm, tempered, however, by one of the most kindly and genial spirits, was wonderful, and when it was known that Leake was going to speak, a large audience generally thronged the court house and hustings. The writer knew Mr. Leake very well and recalls an incident which no one who ever witnessed it can forget. After the Civil War a Member of Congress named Ely became convinced, as he himself stated, that the Southern people needed education at the hands of some skilled politician, and being a New England Yankee he thought that he was fully qualified to enlighten their ignorance. He accordingly sent a challenge to the different towns in the State of Virginia to have a joint debate with their most prominent citizens, and started out at Winchester, where he was met by the elder Holmes Conrad in joint debate. He then moved on to Harrisonburg, where he and

John Harris locked horns. He then came to Staunton, where he met John B. Baldwin, that Rupert of debate. He then came to Charlottesville and had a joint debate with Shelton F. Leake and went home immediately. The writer had the great pleasure, along with an immense audience, of listening to this discussion. A platform was built in the court house yard and Ely opened the debate. It is just to him to say that he was a man of a good deal of ability and courtesy and to a certain degree eloquent, but he had an individual method of pronouncing the names of the Virginia counties and rivers and amongst other things spoke of his visit through the "beeyuitiful" Valley of the "Sheenan-doarah." When Mr. Leake replied he answered each one of Ely's arguments and simply overwhelmed him with ridicule and sarcasm. Ely had spoken of his purpose to educate the Virginians and of his efforts in the beautiful valley aforesaid. Mr. Leake drew himself up to his full height and shaking a long finger in Ely's face remarked to him that he was glad he had visited the "beeyuitiful" Valley of the "Shee-nan-doah"; that no section of the State needed *kindly* education more, but he wanted to call the distinguished gentleman's attention to the fact that whilst he was enjoying the good things of life far from the scene of battle and strife the people of the "beeyuitiful" Valley of the "Shee-nan-doarah" were being educated in the use of fire, rapine and murder by a distinguished professor of all those arts—a little General called Philip B. Sheridan—and therefore they needed kindly treatment. The roar that greeted this sentiment the writer has never heard equalled. Ely declined to reply to Mr. Leake, saying in perfectly good humor that it was impossible to answer the speech, and shaking hands with Mr. Leake, he said, "I did not imagine there were four such speakers in the United States as those I have met on this trip, and I am going home now, having been educated myself more than I have ever been able to educate anybody else."

The writer met Mr. Ely a good many years afterwards, in Switzerland, and on mentioning the fact to him that he had heard the debate in Charlottesville the old gentleman laughed and said that he got exactly what he deserved and that he took back home with him the greatest admiration for the distinguished speakers he had met and the kindliest feeling towards

the people who had listened to him so courteously and kindly when the memories of the War were yet thick upon them.

Mr. Leake died in 1884. He married Miss Rebecca Barbour, of the distinguished Virginia family of that name. She was in every way a worthy helpmeet of her distinguished husband and one of the wittiest and best informed women in the country. It was a perfect delight to listen to Mr. and Mrs. Leake in a friendly exchange of their witticisms: whilst very affectionate and always scrupulously polite, neither spared the other and for hours at a time the circle in which they moved were delighted listeners to their conversation. Judge John M. White married one of the daughters of Mr. Leake and his family is still represented at the Albemarle Bar by Hon. John S. White.

The other distinguished member of the Albemarle bar was Judge William J. Robertson.

Judge Robertson was born in Culpeper County, Virginia, on the 30th day of December, 1817. His father, John Robertson, was a native of Glasgow, in Scotland, coming to Virginia in 1791 and opening a successful school for boys in Albemarle County, which he subsequently moved to Culpeper. He was married in 1815 to Sarah Brand, daughter of another Scotchman who had settled in the County of Albemarle. Mr. Robertson died in 1818, when the future Judge was only a few months old. Mrs. Robertson then returned with her son to Charlottesville, where she died.

William J. Robertson was sent to the School of a Mr. Lewis in Spottsylvania County. He was a very delicate boy and his school teacher recognizing this fact required him to take much outdoor exercise and to devote more time to recreation than to study. The result was that he became one of the most vigorous of men, both in mind and body.

After two years at Mr. Lewis's school he entered the University of Virginia, where he remained for two years; then after teaching for two years he returned to the University and graduated with the degree of Bachelor of Laws. He commenced practice in Louisa Courthouse but very soon moved to the Town of Charlottesville, where he resided until his death.

It was a great bar to which Judge Robertson came: General William F. Gordon, whose daughter he subsequently married,

Southall, Watson, Leake, Rives and Randolph were then in active practice at the bar.

In 1852 he was elected Attorney for the Commonwealth for the County of Albemarle and discharged the duties of that office with great ability and fidelity until elected to the Supreme Court of Appeals in 1858. At that time Judge Robertson had taken a front rank among the practitioners of the State and the fame of his great ability had extended far beyond the boundaries of the County of Albemarle. He was an ardent Democrat, and while always declining to be a candidate for any political office, took part in campaigns before the Civil War. He was a member of the Board of Visitors of the University of Virginia and this and the Judgeship were the only offices he ever held. After the Civil War he at once began a large and lucrative practice and was soon employed as the general counsel of the Chesapeake & Ohio Railroad, and later on of the Norfork & Western. He formed a partnership with Mr. S. V. Southall which continued for ten years and was probably one of the strongest law firms in the State. He will always be remembered for his magnificent argument in the United States vs. Lee, 106 U. S., 196, known as the "Arlington Cases;" and this is but one of the numerous cases that Judge Robertson argued in the Supreme Court of the United States. He should also be gratefully remembered for his superb effort in that court in the cases known as the "Judges' Cases" which we alluded to in our October Number, contesting the right of Judge Rives of the United States District Court to imprison the county judges of the State for failing to place negroes upon the juries. In these cases Judge Robertson fought for and established a great principle which will protect future generations from judicial tyranny. He was probably one of the greatest lawyers the State ever produced. He was powerful, accurate and laborious almost beyond conception. He left nothing to chance but studied his cases from the very inception to the end and his use of authorities was probably unequalled in selection and method. His arguments whilst concise in statement and forcible, and using no more words than were absolutely necessary to convey thoughts, were yet as a general rule long. On being remonstrated with once by one of his associates in an important jury trial upon the great length he

gave to the minor points in the case he remarked that no lawyer could ever tell what a juryman thought major or minor, and that he believed in laying stress upon every point in a case, not knowing which would impress them the most. His power of sarcasm was unexcelled, and woe be to the unfortunate lawyer who compelled its use, and yet at heart he was one of the kindest of men and had the inborn courtesy of the high-born gentleman. To the younger members of the bar no man was kinder. No matter how young the lawyer was associated with him Judge Robertson listened to what he had to say with the same careful attention and courtesy that he would have given to Chief Justice Marshall. Nothing gave him greater pleasure than to assist younger lawyers. The writer who lived just across the street from his residence, often had occasion to consult the superb law library which he had in his house. No matter how busily engaged the Judge was, he always asked what point the writer was looking up, and on being informed, would at once lay down his work and do everything in his power to assist. This finally became somewhat embarrassing to the writer and he begged the Judge not to allow him to interfere with his work but to turn him loose in the library. With the strong language which was one of the Judge's characteristics he informed the writer that if he chose to amuse himself after hearing the writer's line of thought, he did not see why the the writer should complain. This was said with a twinkle of the eye, as he added, "You know any man can learn important facts while assisting another, no matter who be is."

In consultation the Judge was not very comforting. He always picked out the weakest point in his own case and magnified them so that associate counsel very often wondered how they had the audacity to bring such a suit. Mr. John Randolph Tucker tells of a case in which he associated Jugde Robertson with him and his client insisted upon having a conference with the Judge. Tucker gave him a letter of introduction and the gentleman went off and saw Judge Robertson at his home in Charlottesville. When he next met Mr. Tucker he said to him, "Randolph, I do not see how I was fool enough ever to bring such a suit and I thought you were a better lawyer than you are to allow me to do so." Mr. Tucker replied, "You have been con-

ferring with Robertson, haven't you?" "Yes," the man replied, "and he has absolutely convinced me that I have no case." Mr. Tucker laughed and replied, "Well now, you just keep quiet and wait until you hear him in the Court House," and he said it was worth a great deal to watch the man's face during Judge Robertson's argument. It lightened up and brightened up until he came out of the courthouse, when he met Tucker and said, "If we lose that case after Robertson's argument there is no justice left in the world." Needless to say they did not lose it

In every relation of life Judge Robertson was one of the highest characters. His sense of honor was unequalled and his life was an example both personally and professionally not to be forgotten. Judge Robertson married twice; his first wife being Hannah Gordon, daughter of General William F. Gordon Some two years after her death he married Mrs. Alice Morris daughter of General Edward Watts and widow of Dr. George W. Morris. By his first marriage he had nine children and by his second marriage, five. It is a remarkable fact that in his immediate family there were four judges: His son, William Gordon Robertson was Judge of the Corporation Court of Roanoke; his son, Edward Watts Robertson was Judge of the Law and Equity Court of the same City; Judge Allen Hanckel, of the Corporation Court of Norfolk, married his daughter Alice, and Judge Robertson's step-son, Hon. George Watts Morris, was Judge of the Corporation Court of the City of Charlottesville.

Judge Robertson died on the 27th day of May, 1898, at his residence in Charlottesville, and left behind him a reputation which must long linger in his native State.

While John Randolph Tucker was a resident of Albemarle County only for a short time, during the Civil War, he qualified for practice at the Albemarle Bar and appeared frequently in the Albemarle Courts. His life is almost a part of Virginia history and needs no extended notice. Born in Winchester on December 24th, 1823, he was educated at the University of Virginia, was Attorney General of Virginia from 1857 to 1865, was Professor of Equity and Public Law at Washington and Lee University, and gave up that position to serve in the 44th, 45th, 46th, 47th, 48th and 49th Congresses as a Democrat. On retiring

from public life he was elected Professor of Constitutional Law in Washington and Lee University, and died in his home at Lexington on the 12th day of February, 1897.

Mr. Tucker was a great lawyer, a man of infinite wit, one of the most delightful companions in social life, and a man whose character and attainments were of the very highest order in every respect. As a constitutional lawyer he had few equals in Virginia; as a public speaker his eloquence was only equalled by his marshalling of facts, and he interspersed argument with illustration alike witty, humorous and touching the point under discussion. He was President of the Virginia Bar association and was not only admired but beloved throughout the entire Commonwealth.

Distraint for Taxes—Has the Treasurer a Right to Break Open an Outer Door?

A rather curious condition of affairs seems to exist in regard to the right of the treasurer to break upon an outer door where he shall have made a levy for the payment of delinquent taxes. Section 2410 of the Code of 1919 provides that the treasurer may collect taxes which the person by whom they are due has failed or refused to pay, by distress or otherwise, and in case it comes to the knowledge of the treasurer that any such person or persons owing such tax or levies is moving, or contemplates moving from the county or corporation prior to the 1st day of December, he shall have power to collect same, by distress or otherwise, at any time after said bills shall have come into his hands. Now, has the treasurer or his deputy a right to break open an outer door in order to sell the property distrained for taxes? Section 5526 of the Code provides that an officer having such distress warrant or attachment *for rent* may break open and enter a house in the daytime if necessary. Section 6490 provides that an officer in whose hands an *execution* is placed to be levied, may if need be oreak open the outer doors of a dwelling house in the daytime, after having first demanded admittance of the occupant. This last section is new. It will be noted that nowhere in the tax law is the right given an official to break open the outer door.

Now, how can he get the property distrained on for taxes when he has no right to break open a house in which it may be locked up? This is probably one of the cases in which this question has never been thought of by the legislative body, and therefore the right to break open the outer door of a house in case of a distress for taxes has never been contemplated. Ought not this omission to be corrected by the Legislature?

Procedure by Motion for Judgment—Pleas in Abatement.

By the act approved February 10th, 1920, amending Section 6105 of the Code of Virginia it was provided that "Where an application or plea shows on its face proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed unless it be taken by plea in abatement. No such plea, or any other plea in abatement shall be received after the defendant has demurred, pleaded in bar, or answered to the declaration or bill, *nor after the rules next succeeding the rules at which the declaration or bill is filed.*"

Now, how is it possible to file a plea in abatement in a notice of motion for judgment? The notice, whilst returnable to the Clerk's Office five days after service, must then be docketed, but does not come up for trial until the day to which it is returnable. Must a plea in abatement be filed upon the day that the notice is docketed? No rules of course are taken upon the motion, and therefore it is a matter of very grave doubt as to when the plea in abatement can be filed. Our Court of Appeals has decided that pleading upon a motion, whilst informal and much greater latitude allowed than in Common Law pleading, yet it was not contemplated that all rules of pleading were to be abrogated. *Preston* v. *Salem Imp. Co.*, 91 Va. 582. The question therefore remains an open one and not without grave doubt as to when a plea in abatement can be filed. We think it would be well enough if the section aforementioned should be amended to provide a fixed time at which pleas in abatement may be filed in a proceeding for judgment on motion.

Mandamus — Electoral Board — Colored Judges of Election.

A petition for a mandamus filed before the Honorable A. D. Dabney, Judge of the Corporation Court of the City of Charlottesville has givsn rise to some interesting questions. By Section 84 of the Code it is provided that an electoral board shall be appointed by the court. It is further provided by that section that each electoral board shall appoint judges, clerks and registrars of election for its city or county and in appointing judges of election, representation as far as possible shall be given to each of the two political parties which at the general election next preceding their appointment cast the highest and next highest number of votes. It appears that in the City of Charlottesville, ever since the Constitution of 1868, it had been the custom of the electoral board to appoint one colored judge for each ward in what was then the town. At the time these appointments were made the colored people constituted almost the entire Republican vote in the city and the Board picked out four of the most respectable colored Republicans in the City and appointed one judge for each precinct. One of the first colored judges appointed was a member of the Constitutional Convention of 1868, who served until his death, when his son was appointed to succeed him. One of these judges was a colored man in the town worth probably one hundred and fifty to two hundred thousand dollars and there was never any complaint raised as to the intelligence, fairness or conduct in office of any of these judges. Just prior to the late election a request was made for the first time by certain Republicans that these colored men should be removed and white Republicans appointed in their places, they claiming that the so-called "Lily white" Republican party organized since the general election held in the fall of 1920 was the regular Republican party and that these colored men did not belong to it. The Electoral Board substituted two white Republicans in two of the precincts where there were hardly any colored voters, but retained colored men in the two wards where the negro Republicans were largely in the majority in the party. A white Republican in the City of Charlottesville then applied for a mandamus to compel the judges to appoint white Republicans in the two

wards where negro Republicans had been appointed, claiming that these colored men did not represent the political party which at the general election next preceding their appointment cast the next highest number of votes. The Judge refused the mandamus and we publish with great pleasure his opinion and decree, at the end of this article.

Now, a rather serious question arises *in limine*. Had the judge a right to issue a mandamus against the members of the Electoral Board when they had decided which was the political party receiving the next highest number of votes and appointed judges from the persons they considered belonging to that party? Was not their act in this respect one with which the court had no right to interfere? Is it doubtful whether this was a mere ministerial duty?

Then the next question comes—Can a portion of one party declare that they only are the simon pure and kick everybody else out of the party who does not agree with them? It seems to us the only test in this case was the man's own individual volition and that if he voted with the Republican Party at the last Presidential election no action of anybody else could declare that he was not a member of that party. In the instant case both of the colored judges testified that they voted the Republican ticket at the last general election preceding their appointment and that they were Republicans and would vote the Republican ticket at the coming election. Did not that end the matter at once? We think it did.

Judge Dabney's opinion is as follows:

In re: PETITION FOR MANDAMUS

R. N. FLANAGAN

v.

ELECTORAL BOARD OF THE

CITY OF CHARLOTTESVILLE.

This case coming on this day to be heard, and all parties being present in person and by counsel, and the evidence having been fully heard, the Court adjudges and orders that the following facts are clearly shown:

1st—For many years the Electoral Board has duly appointed one colored election judge for each precinct of this City.

2nd—Said appointments have always been heretofore made by the consent or request of the Republican party, as proper representatives of that party—the law requiring that the judges be appointed so that one Republican be appointed for each precinct and two Democrats.

3rd—For a great many years, the great majority of the Republicans in this City and section of the State have been colored people, and a Republican office holder represented his party in the Constitutional Convention of 1868. He was the Republican judge of election for a great many years before his death and his son succeeded him.

4th—These colored Republican election officials have always been intelligent, efficient and honest and have been satisfied that their party has been fairly treated at all elections, so they have been continued without protest until after the last election.

5th—Since then the Electoral Board has been severely criticised by White Republicans for appointing these colored men, and recently formal request has been made that they be replaced with white Republicans.

6th—The board has granted this request in two precincts, but in the two where the colored Republicans greatly out-number the white ones, they have retained two colored judges, and have appointed a white Republican clerk and no colored clerks for each precinct.

Against the appointment of these two colored Republicans this petition complains, but no complaint is made as to the selection of the six white Republican officials.

Upon the foregoing state of facts, this thought presents itself to the court. Is this really a question of judicial relief from a wrong, or is it political demagoguery to influence ignorant voters on the race question? When the negro vote was large, did the white Republicans ever to try to repudiate it? If there were now enough negro voters to carry the state Republican, would this request be made to oust these men? If so no question of politics is involved. But if the motif of this proceeding is politics and not justice, a court of law could not take jurisdiction. This

court will assume as a presumption of law that petitioner is not trying to use this proceeding for political purposes.

It is claimed that these colored men are not Republicans. Colored men were refused participation in a political convention of white men claiming to represent the only Republican party in this state. These colored men voted in the last election for Harding. They and others of their race certainly helped to make the Republican party have next to the largest vote. This made them Republicans then. They claim to be Republicans now. So the issue is whether a man's own volition or that of others makes him a Republican. If the Lily White convention can keep the colored man from voting for Republican candidates, then indeed is he out of that party. But of all the law quoted, none has yet been cited to this effect.

The issue is now reduced to the simple question of whether the negro shall per se be discriminated against. Whatever others may do, the courts of this state never have and never will do this.

So this court cannot hold that these two colored election judges are not members of the party casting next to the largest vote at the last general election. On the contrary, the court is of the opinion that the casting of a vote for the candidates of a political party makes the voter a member of that party until he changes his own convictions. And the action of the Electoral Board in appointing Inge and Coles violates no law or principle of law or justice in the opinion of the court.

As to the complaint that the Board has violated the law in failing to meet in May, of course this is not so mandatory as to nullify all their subsequent acts. And strangely enough petitioner does not complain of the subsequent appointment of the six white Republican officials.

No gentlemen of higher integrity can be found in this city than the members of our Electoral Board, and the Court sustains their every action complained of and adjudges and orders that the request for a writ of mandamus be and is denied and that defendants recover their costs, and the case be stricken from the docket.